THE

Madras Weekly Notes.

1911] Sunday, November 12, 1911 [1911

THE DOCTRINE OF CONSTRUCTION :—BAR BY LIMITATION, AS APPLIED TO JOINT-TRUSTEES.

We are unable to accept the view of their Lordships, *the Chief Justice* and *Mr. Justice Munro*, expressed in *Thyagaraja Pillai* v. *Ratnasabhapathy Pillai*, 34 Mad. 284. Their Lordships decide that if one of several joint trustees is barred, the others are also barred. To quote the language of the learned Chief Justice 'I think on the facts of this case the joint trustee having taken no steps to protect the trust and his right to take steps being now time-barred it follows as a matter of law that the right of the joint trustee is also barred'. We must understand their Lordships to have come to this conclusion on the application of S. 7 of the Limitation Act. What S. 7 says is that where one of several joint creditors or claimants is under any such disability (*Vide* S. 7) and when a discharge can be given without the concurrence of such person, time will run against them all. The whole question resolves itself into this, whether one of several joint-trustees can give a valid discharge without the concurrence of the others.

The general rule is that one of two holders of a joint right cannot give a valid discharge without the concurrence of the other unless they are both partners, executors or members of a Mitakshara joint family. *Vide* Mitra on Limitation Vol. II, p. 755. *Harrihar Pershad* v. *Bholi Pershad*, 6 C. L. J. 383.

Even in the case of a joint Hindu family it is only the managing member that can give a valid discharge without the concurrence of the other members. The reason of the rule is that he represents the other members of the family ; this idea of representation is involved in the very conception of a joint family which is one and indivisible. *Vigneswara* v. *Bapayya*, 16 Mad. 436, 440 ; *Ganga Dayal* v. *Mani Ram*, 31 All. 156.

The test in all these cases is whether the substantive rights and obligations of the several claimants are identical. *Johnson* v. *Madras Ry. Co.*, 28 Mad. 479 and 6 C. L. J. p. 383.

The true notion of joint rights and joint obligations is when one of the several persons entitled to a joint right can require performance to himself of the entire obligation correlative to the right and when one of the several persons under a joint obligation can be required to render full performance of the entire obligation. To quote from Lindley on Jurisprudence, S. 117 A " If the right of several persons thus entitled or the duty of several persons thus obliged is identical and if the right or duty arises from simultaneously combined expression of will, such persons are termed *correi*, those thus entitled being *correi credendi*, those thus obliged being *correi debendi*."

That such a full correal relation exists in the case of a manager of a joint Hindu family cannot be disputed.

That a similar relationship exists bet-

ween partners is clear from sections 250, 251 and 253. Section 250 makes every partner liable to make compensation to third persons for loss or damage arising from neglect or fraud of any partner in the management of the partnership business. S. 251 treats of the binding nature of the acts done by any partner in the course of the partnership business, on the remaining members of the firm. S. 253, cl.1 speaks of the joint ownership of the partners, in the property of the firm while cl. 3 recognizes the right of every partner to take part in the management of the partnership business. In the case of executors too, they are in law regarded as but one person representing the testator. Bacon's Abrd. Executor (D), Shephard's Touchstone 434.

A gift, sale, surrender, payment, release or Judgment by confession by one executor is as effectual as if they all joined (Walker and Elgood on Executors, p. 160). A release by one executor of his interests does not convey any interest for each is possessed of the whole. But a release by one of his share of the debt to a third person operates as a discharge of the whole debt. William's Executors and Administrators, Vol. i, pp. 684, 685, 2 Ves. Sen. 167, Godolph Pt. 2, C. 16, S. 1. They are entitled to a joint right of action. An acknowledgment of a statute-barred debt is binding on the others. (Williams, Vol. I, p. 717.)

Apart from the fact that the right of survivorship exists between the several trustees so that the surviving members are entitled to the management of the whole trust in case of the decease of any trustee, the test which we have laid down above and which, on examination we find, is fully satisfied in the case of a joint Mitakshara family, partners, and executors, fails; the jural relation that must exist between the joint claimants before S. 7 bars the right of suit of the other members is found wanting in the case of joint trustees. The Indian Trusts Act (Act II of 1882) lays down the relation of one trustee to another, their rights and liabilities in unambiguous terms. S. 26 says that one trustee is not, as such, liable for a breach of trust committed by his co-trustee except where he himself partcipates in or connives in the breach of trust. S. 48 makes it clear that all trustees must join in the execution of the trust that no one of them can act singly in the discharge of the trust. Payment to one trustee when there are several trustees does not operate as a discharge of the debt. *Lee* v. *Sankey*, 15 Eq. 204. Investment of the trust funds must be made in joint names of all the trustees and debts must be proved jointly. Acknowledgment by one is insufficient to save the bar of limitation. In re *Macdonald* [1897] 2 Ch. D. 181.

Thus on principle and on authority the rights and duties of the several trustees are not identical, and one of several trustees cannot give a valid discharge so as to bar the suit of the other trustees who may be under disability.

THE WEEK'S CASES.

6th November, 1911.

Benson, J. and Sundara Aiyar, J.

Cr. R. C. 153 of 1911.

In proceedings taken under section 145 of the Code of Criminal Procedure to determine a dispute as to possession of certain immoveable property, it was contended that as one of the parties, had by previously filing a Civil suit for possession, of the same item impliedly admitted the other to be in possession, there is no longer any dispute as to possession and

the Magistrate had no Jurisdiction to proceed under that section. *Held* that the mere fact of filing a suit for possession does not show that the other party will be in possession at the time of the enquiry and the view taken by the Calcutta High Court in VII C.W.-N. p. 538 cannot be supported and the Magistrate has jurisdiction to proceed under section 145, Cr. P. C.

Cr. R. C. 260 of 1911.

Where a person was charged, tried and convicted at one trial of the offence of mischief and criminal misappropriation in respect of cutting on different occasions, 70 trees standing on kumaki land in his possession, it was contended that as each separate cutting constitites a distinct offence, there is consequently a misjoinder of charges, and the charge itself not having been drawn in such a manner as to constitute all the cuttings one single transaction, the trial is illegal and must be set aside.

Held (1) that it is clear that each separate cutting is a distinct offence and the only section which authorizes such joinder of charges is section 222, clause 6 relating to misappropriation of money and in this case there is nothing to show that all the different cuttings are part of one transaction, and even the charge is silent about this, and the trial is illegal and the connviction must be set aside.

Abdur Rahim, J.

Cr. A. C. 271 of 1911.

Where the only fact proved against a person charged with mischief in having opened a sluice was that he opened the sluice and allowed water to get into his fields but no evidence was let in to show that any damage or loss was caused to others by his act, *held* that he could not be convicted of the offence of mischief for damage must be proved as a fact and not inferred from a number of other circumstances.

7th November, 1911.

Benson, J. and Sundara Aiyer, J.

S. A. 726 of 1910.

Where Government grants a tree-pattah first to one person, and assigns the land on which the trees stand to another and subsequently cancels the tree-pattah that of itself, does not vest the trees in the land pattadar, so as to enable him to sue to recover possession of them from the tree-pattadar, and for this purpose, the trees must be expressly assigned to the land pattadar.

Wallis, J and Abdur Rahim, J.

C M. P. 493 of 1911.

Where it appears from an application for leave to appeal to the Privy Council that the right of the trustee of a temple to lease out permanently building-sites had been questioned and where it further appears that upon the site so leased out which is worth only Rs. 2,000 a structure costing about Rs. 12,000 had been erected and which the decree directs to be removed, it is clear that such leave should be granted as the decree involves directly or indirectly, some qustion regarding property worth Rs. 10000 and upwards.

8th November, 1911.

Benson, J. and Sundara Aiyer, J.

S. A. 252 of 1910.

A sale of land for arrears of water cess due to Government though of a tenant in an inam village is free of incumbrances created on it by him and a suit by a mortgagee to set aside such a sale cannot be maintained.

Section 42 of Act II of 1864, declares such land to be free of incumbrances, and the term "public revenue" is defined in

section 1 of the Act to include also arrears of water-cess levied under Act VII of 1865.

S. A. 470 of 1910.

Where a father makes a gift of his land to his sons to be held by them under Putravakosam tenure *i.e.*, a gift by a father to his sons to be held by them indivisibly such land does not become divisible merely because a creditor attaches the share of one of the sons and brings it to sale; the effect of the creation of such a gift is to make the sons tenants-in-common and there must be a contract among them to destroy such a tenancy. Steps taken by third person will not affect the indivisible nature of the tenure.

9th November, 1911.

Wallis J.

Cr. R. C. 219 of 1911.

Where there is a manifestly erroneous decision acquitting an accused, the High Court will interfere in revision.

10th November, 1911.

Wallis, J.

Cr. A. 363 of 1911.

Where a witness makes in the course of his evidence two inconsistent and contradictory statements and where it is found that the later contradictory statement was made through fear, he was guilty of perjury as he deposed to a fact that he knew to be untrue.

Abdur Rahim, J.

C. R. P. 543 of 1910.

When instead of the real name, a different name was inserted by mistake as the payee of a promissory note, parol evidence is admissible to show what was the real intention of the parties under proviso 6 of the Indian Evidence Act, section 92.

REVIEWS

The Indian Decisions New Series, Allahabad, Volume I, Allahabad.

This series is devoted to a re-print of the judgments of the several High Courts in India and of the Judicial Committee of the Privy Council since the year 1875 reported both in the official and in the non-official reports of the country arranged in the chronological order. The present volume is concerned with the decisions of the Allahabad High Court from January 1875 to May 1880. Though the re-print is not a verbatim re-print of the I. L. R. series, yet the original paginations are kept up in regard to the judgments and we have no doubt the book will be useful to practitioners and enable them with the reference table to get at a complete set of the I. L. R. series at a very moderate cost. The head-notes so far as we have been able to see have all been carefully prepared and we are glad to note that there is also a copious and full general index. The book has been well dedicated to the legal profession at whose hands the book is sure to receive ample and due attention.

The Succession Certificate Act, 1889. *Publishers : The Law Printing House, Mount Road, Madras.*

The publishers have issued a revised edition of this Act with the case-law thereon brought up to June 1911.

THE GUARDIAN DIARY, 1912.

We have pleasure in acknowledging receipt of a copy of this useful compilation. The present Book is an improvement upon the previous years and in addition the other useful information a schedule of Court Fees Act, Registration Fees and Stamp Duty which will be found useful by legal practitioners and their clerks. The get-up is excellent and the diary gives as the frontispiece, the portraits of Their Majesties and of the Prince of Wales.